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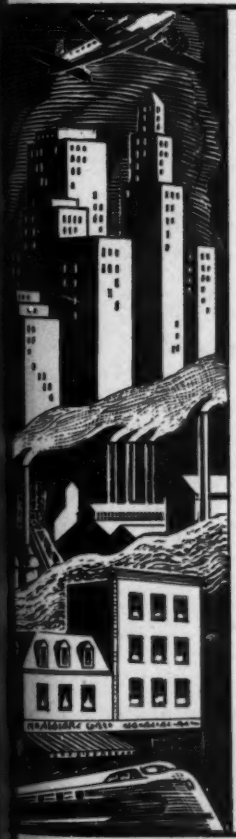
Vol. 23, No. 2 OCTOBER —NOVEMBER 1960 Complete No. 429



DOING BUSINESS IN OTHER STATES: TAXATION PROBLEMS

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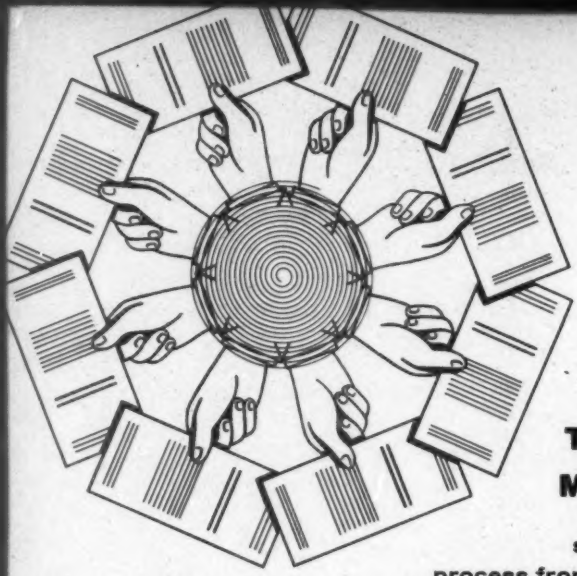
Published by The Corporation Trust Company and Associated Companies



THE WHEEL OF MISFORTUNE . . .

spinning a service of process from hand to hand. First, into the hands of a process server. He attempts service on the employee who is acting as the company's statutory agent in the state. The employee-agent is out of the office, ill. The server leaves the process at the office.

Then, a week later, into the hands of the employee, upon his return to the office. But he, not as well acquainted with the intricacies of service of process as you would like him to be, puts it to the side of his desk while he "catches up" with the reports and correspondence piled up on the other side of his desk during his absence.

Finally, several days later, you, the company's lawyer, get a frantic telephone call from an executive officer telling you the company has been made a defendant in a neligence suit. A special, rush messenger delivers the service into your hands. One look tells you the company must file an answer to the action *tomorrow*.

Unbelieveable? Not if you add up all the unbelievable things that *have* happened and *have* resulted in unnecessary trouble and expense (even an occasional default judgment) for corporations.

Any unnecessary delay, anywhere in the transmittal of the service to you, the company's lawyer, could be troublesome enough.

Small wonder so many thousands of lawyers prefer the direct, speedy, transmittal of service of process provided as part of the CT System of Corporate Protection—available through lawyers only.

The CORPORATION JOURNAL

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OCTOBER—NOVEMBER 1960

Contents

Recent Decisions

unlicensed foreign corporations

Enforcement of Contracts

ACCESS to the courts can be vitally important to the orderly conduct of the business of a corporation. Today, relatively few corporations confine their activities to their domiciliary states, and access to the courts has become particularly important to protect the corporation's interests in foreign states. The deprivation of the right of an unlicensed foreign corporation to enforce its contracts, in what may be the only jurisdiction in which a defendant is amenable to service of process, is a substantial penalty indeed. The serious nature of such a penalty is underlined when it is realized that almost all of the state legislatures have adopted statutes denying access to the courts to foreign corporations which have transacted intrastate business but have failed to comply with the various qualification requirements.

Forty-four states and the District of Columbia have statutes in force denying unlicensed foreign corporations recourse to the courts to enforce contracts entered into within the state relating to intrastate business. In some instances, this statutory disability has not been applied where the contract was made outside the forum states,[1] even though the corporation may have previously been transacting intrastate business. Each statute must be examined to determine the contracts and types of suits embraced by it.

These forty-five jurisdictions can be conveniently grouped according to the effect given to subsequent qualification. In twelve, Alabama, Arizona, Arkansas, Idaho, Michigan, Mississippi, Montana,[2] New York, South Dakota, Utah, Vermont and Wyoming, such contracts, made in the state before qualification, may not be enforced in the state courts even after qualification. In these states, apart from incurring other penalties for failure to comply with the qualification requirements, the foreign corporation cannot safely postpone compliance until a breach of contract occurs if it expects to enforce the contract in the state's courts. If the corporation's activities in the state were such as to require it to qualify at the time it entered into the contract in the state in connection with its intrastate business, then subsequent qualification will not remove the disability and the corporation will continue to be barred from enforcing that contract in the state courts.

In thirty-two jurisdictions, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii,

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[1] *Holder v. Aultman, Miller & Co.*, (Mich. 1898) 169 U. S. 81, 18 S. Ct. 269; *Roberts v. American Machine Co.*, (Idaho 1959) 347 P. 2d 759, discussed in CCH CORPORATION LAW GUIDE ¶ 9813; *Land Development Corp. v. Cannaday*, (1953) 74 Idaho 233, 258 P. 2d 976; *Bonham National Bank v. Grimes Pass Placer Mining Co.*, (1910) 18 Idaho 629, 111 Pac. 1078; *Furst-McNess Co. v. Kielly*, (1943) 233 Iowa 77, 88 N. W. 2d 730; *Burch Mfg. Co. v. McKee*, (1942) 231 Iowa 730, 2 N. W. 2d 98; *Richards-Wilson Mfg. v. Talbot & Meier*, (1930) 252 Mich. 622, 233 N. W. 437; *Manhattan Overseas Co. v. Camden County Beverage Co.*, (1940) 125 N.J.L. 239, 15 A. 2d 217; *Transradio Press Service, Inc. v. Whitmore*, (1943) 47 N. M. 95, 137 P. 2d 309; *Bertlof Bros. Inc. v. Leuthardt*, (1941) 261 App. Div. 981, 26 N.Y.S. 2d 114; *Johnson & Johnson v. Narragansett Wiping Supply Co.*, (R.I.)— A. 2d—; *Shoenterprise Corporation v. Butler*, (Tenn. 1959) 329 S. W. 2d 361, cert. denied, Tenn. Sup. Ct., December 11, 1959, discussed in CCH CORPORATION LAW GUIDE ¶ 9768; *New England Road Machinery Co. v. Calkins*, (Vt.) 149 A. 2d 734.

[2] See *Hutterian Brethran v. Haas*, (1953) 116 F. Supp. 37.

Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, West Virginia and Wisconsin, the statutory bar to enforcement is removed by subsequent qualification. In these thirty-two, the foreign corporation can remove the bar by qualifying at any time before suit, and it has been held in some states, even during the suit itself.[3]

New Jersey's position on the effect of subsequent qualification is unique, and it cannot properly be placed with either of the two foregoing groups of states. By virtue of one statute,[4] a foreign corporation is barred until qualified from enforcing in the New Jersey courts contracts made in the State in connection with intrastate business. Under this statute, subsequent qualification removes the disability, and New Jersey would appear to fall in the second group mentioned above. However, New Jersey has in force a "retaliatory" statute[5] which imposes on corporations from another state the same burdens imposed by that other state on New Jersey corporations. Therefore, on corporations organized in any of the twelve states mentioned above in which contracts cannot be enforced even after subsequent qualification, the New Jersey retaliatory statute would impose the same disability, and they would be barred from enforcing such contracts in the New Jersey courts.

In eight of the states in which the disability may be removed by subsequent qualification, there are statutory provisions for the payment of specific penalties in connection with a belated qualification: California ($250), Connecticut ($250), Florida ($250), Hawaii ($100), Maryland ($200), Ohio ($250 and 15% of license fees), Pennsylvania ($250) and Wisconsin (50% of fees). These penalties may be exacted in addition to penalties for failure to file reports and pay taxes due under various statutes.

Among the remaining states, in which there is no such statutory penalty, the trend of the decisions is to permit the use of the courts to enforce such contracts.[6] In Tennessee, however, even in the absence of statute, such contracts have been regarded by the courts as unenforceable,[7] and in South Carolina a Federal court has taken the position that the right to sue is suspended until qualification is effected.[8]

It should be mentioned that the Federal courts can be expected to apply the applicable state law, and a foreign corporation barred by state law from suing in the state courts would probably find itself barred from the Federal courts as well.[9]

As almost all states have enacted provisions barring, to a greater or lesser extent, the enforcement of contracts by unlicensed foreign corporations doing local business, these statutes should be carefully considered by counsel whenever a corporation's activities are extended beyond the borders of the state in which it is incorporated.

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[3] *J. R. Watkins Co. v. Floyd*, (La. 1960) 119 So. 2d 164, discussed in CCH CORPORATION LAW GUIDE ¶ 9751.

[4] R.S. 14:15-4, N.J.S.A.

[5] R.S. 14:15-5, N.J.S.A.

[6] *Model Heating Co. v. Magarity*, (1911) 25 Del. 459, 81 A. 394; *Alston v. N. Y. Contract Purchase Corp.*, (1927) 36 Ga. App. 777, 138 S. E. 270; *Heart of America Ins. Agency, Inc. v. Wichita Cab & Transport Co.*, (1940) 151 Kan. 420, 99 P. 2d 765; *Big Four Mills, Ltd. v. Commercial Credit Co.*, (1948) 307 Ky. 612, 211 S. W. 2d 831.

[7] *Interstate Amusement Co. v. Albert*, (1916) 239 U. S. 560, 36 S. Ct. 168, aff'g (1913) 128 Tenn. 417, 161 S. W. 488; *In re Meyer & Judd*, (1924) 1 F. 2d 513; *United Artists Corp. v. Board of Censors*, (1950) 189 Tenn. 397, 225 S. W. 2d 550, cert. denied, 339 U. S. 952, 70 S. Ct. 839; *Peck-Williamson H. & V. Co. v. McKnight & Merz*, (1918) 140 Tenn. 563, 205 S. W. 419.

[8] *Kirven v. Virginia-Carolina Chemical Co.*, (1906) 145 Fed. 288.

[9] *Woods v. Interstate Realty Co.*, (Miss. 1949) 337 U. S. 535, 69 S. Ct. 1235.

domestic corporations

MARYLAND

Service of notice of intention to claim mechanic's lien by service on resident agent, designated by corporation under statute, held sufficient.

This was an action involving the foreclosure of a mechanic's lien. Maryland Code 1957, Art. 63, Section 11, requires a subcontractor, in order to perfect his lien, to give notice in writing to the "owner or agent, if resident within the city or county, of his intention to claim such lien." The subcontractor in this case mailed a registered letter containing the notice to the individual listed in the records of the State Tax Commission as the resident agent of the owner, and the owner argued that this was insufficient notice since "the only authority of a resident agent is to accept service of process" as provided in the corporation law.

The Court of Appeals of Maryland, however, pointed out that another section of the Code, Sec. 99, Art. 23, recognizes, at least by implication, that statutory notices, as well as process, may be served upon a resident agent. The court concluded that it could see "no reason why the resident agent directly authorized to accept process on behalf of the corporation, should be ineligible to receive other legal notices required to be served upon an 'owner' or the owner's 'agent'."

Jakenjo, Inc. v. Blizzard, 155 A. 2d 661. Louis E. Carliner, of Baltimore, for appellant. Nelson R. Kerr, of Towson (Stanley E. Hartman, of Baltimore, on the brief), for appellee.

NEW YORK

Director's right to inspection of corporate books and records held absolute, and burden of proving bad faith held to be on corporation.

This was an application by a director for an order for the inspection of the books and records of defendant corporation. The corporation and its officers refused inspection on the ground that the petitioning director had resigned, and on the ground of bad faith.

The Supreme Court, Appellate Division, Second Department, noted that the petitioner's resignation as a director was not to become effective unless and until the corporation or its officers elected to purchase his shares of stock. No such election was made, and the Court concluded that petitioner's right of inspection, as a director, was absolute. "Petitioner is not required to sustain the burden of proving his good faith. On the contrary, appellants have the burden of proving the bad faith on his part which they allege in their answer." The order granting the inspection was affirmed.

Hausner v. Hopewell Products, Inc., 201 N.Y.S. 2d 252. Yellon, Banno & Lombardo, (Herman Yellon, of counsel), of Mineola, for appellant. Kalina & Kaplan, of Brooklyn (Jos. H. Stein, of New York City, of counsel), for respondent.

OREGON

Where petition for inspection showed on its face a proper purpose, and corporation failed to prove bad faith or improper purpose, shareholder held entitled to inspection under statute.

Plaintiff stockholder brought this action for mandamus to enforce his right to inspect and copy the list of shareholders of defendant corporation. The purpose for the inspection of the list stated by the plaintiff was to enable him to communicate with the other shareholders and to discuss company affairs with them. Defendant based its refusal to permit plaintiff to inspect and copy the list on plaintiff's alleged bad faith and lack of a proper purpose.

The Supreme Court of Oregon, sustaining the judgment of the trial court, determined that, under Section 46 of the Oregon Business Corporation Act, two classes of stockholders were created. The first class, which included plaintiff, consisted of shareholders who had been such for at least six months (or were holders of at least five per cent of the outstanding stock). The second class included those shareholders who, irrespective of the period of time that they had been shareholders or the number of shares held, could compel inspection by proof of a proper purpose. The Court concluded that, although the statute placed the burden of proving a proper purpose on the shareholders in the second class, the shareholders in the first class, including plaintiff, were "entitled to make such demand without being called upon first to establish proof that such demand is for a proper purpose." Since the plaintiff's petition showed "on its face that the inspection was requested for a proper purpose," and since the defendant failed to sustain its burden of proving bad faith or improper purpose, the Court sustained the judgment of the trial court permitting the inspection.

Rosentool v. Bonanza Oil and Mine Corp., 352 P. 2d 138. (Discussed in CCH CORPORATION LAW GUIDE ¶9724.) William P. Mumford (Hale G. Thompson on the brief), of Eugene, for appellant. Richard Bryson (Bryson & Bryson on the brief), of Eugene, for respondent.

foreign corporations

ARKANSAS

Unlicensed foreign corporation held entitled to bring suit to protect its property where suit did not necessarily involve enforcement of prohibited contract.

Plaintiff foreign corporation brought this action for conversion, and defendant moved for summary judgment on the ground that the contract involved was executed in Arkansas and that on the date of its execution the plaintiff was transacting business in Arkansas without having qualified to do so.

The Arkansas Supreme Court determined first that the provision of Act 313 of 1907, to the effect that an unlicensed foreign corporation could not make any contract in Arkansas which could be enforced by it, was not impliedly repealed by Act 131 of 1947 which merely prescribed a monetary penalty. The Court concluded, however, that on a motion for summary judgment it could not declare with certainty that the plaintiff would be compelled to rely on the contract. "A foreign corporation, even though unlicensed, is nevertheless permitted to bring suit to protect its property as long as the suit does not unavoidably involve the enforcement of a prohibited contract." The trial court's judgment sustaining the defendant's motion for summary judgment was reversed.

Arkansas Airmotive Div. v. Arkansas Aviation Sales, Inc., 335 S. W. 2d 813. (Discussed in CCH CORPORATION LAW GUIDE ¶ 9719.) Coleman, Gantt & Ramsay, E. Harley Cox, Jr., of Pine Bluff, for appellant. Mehaffy, Smith & Williams, by W. A. Eldredge, Jr., of Little Rock, for appellee.

CALIFORNIA

Assignee of unqualified foreign corporation held not precluded from maintaining suit on contracts in California where there was no proof that final acceptance of contracts took place in that State.

Plaintiff, the assignee of a Canadian corporation not qualified to do business in California, appealed from an order dismissing his actions to recover the balance due on five promissory notes executed by defendant and payable to plaintiff's assignor at Montreal, Canada. Although the negotiations leading to the notes took place in California, there was no evidence to the effect that the final acceptance and consummation of the transaction was made within the State.

The California District Court of Appeal, First District, Division 2, referred to Section 6801 of the California Corporations Code, which precludes the maintenance of an action by an unqualified foreign corporation transacting intrastate business in California. The Court pointed out that the burden of proving that this Section applied in this case was on the party pleading the statute. Noting that there was no proof that the final acceptance took place in California, the Court

concluded that merely carrying on negotiations leading to a contract was not doing such intrastate business so as to bar the foreign corporation, or its assignee, from maintaining the action. The judgment of dismissal was reversed.

Thorner v. Selective Cam Transmission Company, 4 Cal. Rptr. 409. Howe, Finch & Glass of Palo Alto, for appellant. Simeon E. Sheffey, S. A. Steindorf, of San Francisco, for respondent.

Unlicensed foreign corporation held not subject to suit in California where the cause of action did not arise in, and was not related to corporation's activities in, California.

Three actions for wrongful death and personal injuries were instituted in California against defendant Iowa corporation by service on defendant's California manufacturers' agent. The injuries and death occurred in Idaho when a gas meter and pressure reducing station exploded, allegedly because of defective equipment manufactured by defendant. Defendant's principal offices and manufacturing plants were in Iowa; it had no employees or property in California, and had not appointed an agent there to receive service of process. Defendant's products were sold in California through independent manufacturers' agents who also sold the products of other manufacturers. These agents received commissions on sales, and provided defendant's catalogues to interested persons on request. Defendant was listed in telephone books at the agents' addresses and numbers. The causes of action arose in Idaho, the defective equipment was not sold in California, and neither of the decedents, and none of the plaintiffs, were California residents. Defendant moved to quash the service on the ground that it was not doing business in California and, from a denial of its motions, petitioned the California Supreme Court for a writ of mandate to compel the Superior Court of San Francisco to quash the service.

The State Supreme Court reiterated that the causes of action did not arise out of and were not related to defendant's activities in California, none of the relevant events occurred there, evidence could be produced as easily elsewhere, and even if plaintiffs could not secure jurisdiction over defendant in Idaho, they could prosecute their actions as conveniently in Iowa as in California. The petition for a writ of mandate was granted.

Fisher Governor Company v. Superior Court, 347 P. 2d 1. Pelton, Gunther, Durney & Gudmundson, George W. Granger and Thomas N. Kearney, of San Francisco, for petitioner. Carroll, Davis, Burdick & McDonough and Francis Carroll, of San Francisco, for real parties in interest.

HAWAII

Service on unlicensed foreign corporation by service on officer of alleged agent held insufficient where activities of foreign corporation did not amount to "doing business."

Petitioner, a Delaware corporation, was joined as a defendant in an action filed by plaintiffs for recovery of damages as a result of injuries incurred while doing stevedoring work on petitioner's ship in Honolulu harbor. Service was attempted on petitioner by service on the assistant treasurer of a company which occasionally served as agent for petitioner. Petitioner had no office, general agent or property in Hawaii. From a denial by the trial court of petitioner's motion to quash the service on the ground that it did no business in Hawaii and had no representative in Hawaii upon whom service could be made, petitioner brought this proceeding in the Supreme Court of Hawaii for a writ of prohibition forbidding the trial judge and the plaintiffs from proceeding further against it.

The Supreme Court of Hawaii addressed itself, among other points, to the question of whether petitioner, as an unqualified foreign corporation, had the right to sue under R.L.H. 1955, Section 174-10. The court concluded that that provision applied only to foreign corporations which were required to register, and that the record did not show that petitioner was engaged in any activity which made it subject to registration.

As to the question of the jurisdiction of the trial court, the Supreme Court observed that there was no showing regarding the frequency of calls made by petitioner's vessels at Hawaiian ports. In addition, the Court pointed out that the evidence was that the alleged agent only occasionally represented petitioner and did not render any service to petitioner's vessel on the particular occasion mentioned in the complaint. "The evidence adduced by petitioner was at least sufficient to put the question of personal jurisdiction in issue. Thereafter the burden of establishing the jurisdiction shifted to plaintiffs. Plaintiffs did nothing to sustain their burden." The writ against proceeding further against petitioner in the trial court was made absolute.

Victory Carriers, Inc. v. Hawkins, 352 P. 2d 314. Roy A. Vitousek, Jr., (Pratt & Tavares), for petitioner. James A. King, (Bouslog & Symonds), for respondents.

MINNESOTA

Unlicensed foreign corporation held not doing business in Minnesota so as to be barred from bringing action in Minnesota courts where no part of its activity in the State was disconnected from its interstate business.

Plaintiff unlicensed foreign corporation moved for a temporary injunction to prevent defendant from selling plaintiff's products below their fair trade price in Minnesota. Plaintiff manufactured health and beauty aids and sold them on a nation wide scale. It maintained no office, bank account, address or telephone listing in Minnesota, but employed a Minnesota resident to do promotional work. That

individual's function was to demonstrate to retailers how best to display and promote plaintiff's products, and to investigate fair trade violations in connection with plaintiff's products when directed to do so by the plaintiff. Occasionally retailers wrote orders on blanks provided by this individual and turned them over to him, and he turned them over to local drug wholesaling concerns. Plaintiff had several hundred fair trade contracts in force with Minnesota retailers.

It was conceded by the parties that the "heart of the controversy" was whether plaintiff was transacting business in Minnesota without having qualified so as to be disabled from bringing an action in the Minnesota courts. The Minnesota District Court, Hennepin County, concluded that the plaintiff was not doing business in the state. The Court pointed out that the activities of the plaintiff in Minnesota were in furtherance of its interstate operation, that the person promoting plaintiff's products in Minnesota also did so in four other states, and that the plaintiff's fair trade contracts in Minnesota were an integral part of its policy to maintain uniform prices on its products throughout the nation.

Weco Products Company v. G.E.M. of St. Louis, Inc., CCH MINNESOTA TAX REPORTS ¶ 200-103, Minnesota District Court, Hennepin County, Fourth Judicial District, March 1, 1960. (Discussed in CCH CORPORATION LAW GUIDE ¶ 9773.) Lewis Garner, Robert T. Newbury, Harlan L. Nelson and Maurice M. Moore, for plaintiff. Maslon, Kaplan, Edelman, Joseph & Borman, by Hyman Edelman, for defendants.

Unlicensed foreign corporation held not subject to service of process by service on the Secretary of State where it shipped goods into the state for resale purposes.

Plaintiff Minnesota corporation brought this action against two unlicensed foreign corporations by having the complaint and summons served upon the Secretary of State of Minnesota. One of the defendants moved to dismiss the complaint on the ground that it was not doing business in Minnesota so as to be subject to service of process. The moving defendant sold hearing aids for resale purposes to a drug store in each of four Minnesota cities. The orders, payments and merchandise were sent by mail. Defendant supplied the equipment used by the drug stores for hearing loss testing, point-of-sale advertising matter, inventories from which sales could be made, and a warranty of the performance of the product.

The United States District Court, District of Minnesota, Fourth Division, declared that "if goods are sent into a forum state for resale purposes without other contacts with that state, then jurisdiction over the person of a nonresident foreign manufacturing corporation cannot constitutionally be obtained without personal service of process." The Court concluded that defendant's activities did not effectively enlarge contacts with respect to the shipping of goods to the forum state, and dismissed the complaint as to the moving defendant.

Dahlberg Company v. American Sound Products, Inc., CCH MINNESOTA TAX REPORTS ¶ 200-106, 179 F. Supp. 928. John M. Palmer, of Levitt, Palmer and Rogers, of Minneapolis, for plaintiff. Harold D. Field, Jr., of Leonard, Street and Deinard, of Minneapolis, for defendant.

MISSISSIPPI

Unlicensed foreign corporations held doing business so as to be subject to service of process where they had almost absolute control over manner of doing business of certain Mississippi corporations.

Defendant Florida corporations, not licensed to do business in Mississippi, were distributors of foreign automobiles. Complainants, Mississippi dealers, purchased and paid for the automobiles in Florida. The complainant dealers operated under a contract with defendants which provided that within five days of each month the dealer should forward to defendants, orders for automobiles for the ensuing month. In addition, the contract gave defendant Florida distributors "almost absolute control over the method and manner of doing business by the dealer." Process was served on the defendants by service on the Secretary of State of Mississippi.

The Supreme Court of Mississippi held that defendant distributors were doing business in Mississippi "in the sale and distribution of automobiles and automobile parts as provided in the contract which created the relationship of distributor and dealer in the territory covered by such contract," and were, therefore, properly served under the Mississippi statute permitting service on such companies by service on the Secretary of State.

Jarrard Motors, Inc. v. Jackson Auto & Supply Co. et al., 115 So. 2d 309. Robert G. Nichols, Jr., and Creekmore & Beacham, of Jackson, for appellants. Crisler, Crisler & Bowling, of Jackson, for appellees.

NEW YORK

Unlicensed foreign corporation held not doing business in New York so as to be barred from enforcing contract where its activities in the state were in furtherance of interstate commerce.

The question here was whether plaintiff unlicensed foreign corporation was doing business in New York so as to come within Sec. 218 of the New York General Corporation Law prohibiting such corporations from maintaining an action on a contract made in New York. Plaintiff's name appeared on an office door and building directory in New York, as well as in the Manhattan telephone and classified directories. The tenant of the office was plaintiff's New York sales representative, who paid for the rental of the office, owned the furniture and paid for the telephone listings. Plaintiff had one employee in the office whose primary function was to make preliminary credit checks on prospective customers. All the orders solicited by the sales representative were transmitted to the plaintiff in Georgia for approval, and the merchandise was shipped from the Georgia plant via an interstate carrier to the plaintiff's customers in New York. Most of the

collections were made at the New York office and sent to plaintiff's factor in New York City.

The New York Supreme Court concluded that plaintiff was engaged in interstate commerce, and that its activities, "when viewed in their totality, can fairly be said to have been in furtherance of and to facilitate such interstate commerce." Judgment for the plaintiff.

William L. Bonnell Company v. Katz, 196 N.Y.S. 2d 763. (Discussed in CCH CORPORATION LAW GUIDE ¶ 9715.) Daniel S. Berman, for plaintiff. Eckhaus, Eckhaus & Eschen, Marvin Eschen of counsel, for defendant.

PENNSYLVANIA

Activities of agent of unlicensed foreign corporation, conducted under the close supervision of the corporation, held sufficient to subject the corporation to service of process.

The question here was whether the activities of the defendant unlicensed foreign corporation were sufficient to constitute the "doing of business" in Pennsylvania so as to subject it to service of process by registered mail via the Secretary of the Commonwealth. An agent of defendant, closely under the corporation's supervision, was engaged in selling financial and business programs in behalf of defendant to attorneys, banks, life underwriters, and similar enterprises. Defendant's headquarters was in New York City, and it had no office in, nor was it listed in any telephone directory in, Pennsylvania. Defendant had assigned an exclusive territory to its agent encompassing thirty-three Pennsylvania counties. The agent maintained an office in his home in Pittsburgh, had his own calling card, and was paid on a commission basis. He contacted each client at least twice a year. Contracts were accepted in New York, and payment was made to the New York office.

The United States District Court, Western District of Pennsylvania, adverted to the close and rigid control over the agent's activities exercised by defendant. The Court concluded that it was satisfied "that a series of acts for the purpose of realizing pecuniary benefit were conducted in Pennsylvania by defendant through its agent and employee as to render it subject to" service of process. The defendant's motion to dismiss was refused.

Wilson v. Institute For Business Planning, Inc., CCH PENNSYLVANIA TAX REPORTS ¶ 200-076, 182 F. Supp. 827. Ralph S. Davis, Jr., Evans, Ivory & Evans, of Pittsburgh, for plaintiff, William C. Walker, Dickie, McCamey, Chilcote & Robinson, of Pittsburgh, for defendant.

Service of process on wholly-owned unlicensed foreign corporations by service on agent of the parent quashed where there was no evidence presented to the effect that separateness of parent and subsidiaries was to be disregarded.

Plaintiffs, husband and wife, residents of Pennsylvania, brought this action on a claim that the wife was injured at a Mexico City hotel, one of the defendants. The three defendants included a hotel corporation organized in Delaware and

registered to do business in Pennsylvania, and a Delaware and a Mexico hotel corporation neither of which was registered to do business in Pennsylvania. The unregistered Delaware corporation was a wholly-owned subsidiary of the qualified corporation, and the unregistered Mexico corporation was a wholly-owned subsidiary of the unregistered Delaware corporation. Plaintiffs attempted to serve the two unqualified corporations by service on the agent of the parent, and also by service on the Secretary of the Commonwealth of Pennsylvania.

The United States District Court, Eastern District of Pennsylvania, observed that "a parent-subsidiary relationship alone is not sufficient to make valid service of process on a subsidiary by serving the parent" unless for reasons of fairness or for practical considerations, the separateness of the two should be disregarded. The Court concluded that evidence was lacking here as to any reason to disregard the separateness of the parent and its subsidiaries.

As to the service on the Secretary of the Commonwealth, which was made on the ground that the subsidiaries were doing business in Pennsylvania and thereby had appointed that official their agent for service of process under Section 1011, subd. B of the Pennsylvania Business Corporation Law, the Court concluded that the subsidiaries were not doing business in Pennsylvania and that there was no evidence to establish that the wife's injuries arose out of acts or omissions which occurred in Pennsylvania. The motions of the two unqualified subsidiaries to quash the service were granted.

Fitzgerald v. Hilton Hotels Corporation, CCH PENNSYLVANIA TAX REPORTS ¶ 200-069, 183 F. Supp. 342. Samuel H. High, Jr., High, Swartz, Childs & Roberts, of Norristown, Pa., for plaintiff. D. Charles Merriwether, of Philadelphia, for defendant.

taxation

FLORIDA

Tax on entire gross receipts from telegraph messages transmitted in interstate commerce between points in Florida through Atlanta, Georgia, held proper where message rates were based entirely on airline distance between Florida points.

This was an appeal by the Florida State Comptroller seeking reversal of a declaratory decree enjoining him from collecting a portion of the Florida gross receipts tax. Taxpayer, Western Union, was engaged in the business of transmitting messages by telegraph between points within Florida. Messages received in a Western Union office in Florida were transmitted first to a reperforator station in Georgia and then back to the point of delivery in Florida. Rates, however, were based entirely on the airline distance between the two points in Florida. The Comptroller attempted to collect the tax on the entire gross receipts from messages transmitted between points in Florida, and Western Union claimed that its operation was interstate and that it should not be required to pay a tax on

the entire receipts but only in the proportion which the mileage of its lines between Florida points and the Georgia border bore to the total mileage between Florida point of origin through Atlanta, Georgia and back to the Florida point of delivery.

The Supreme Court of Florida, reversing the decree below in favor of the taxpayer, pointed out that the rate was based entirely on the airline distance between the Florida points. "Consequently, it is apparent that there has not been demonstrated any logical relationship between the transmission line mileage and the gross receipts in order to establish a fair and proper basis for apportionment." "If the gross receipts are not in any fashion attributable to or the product of the interstate aspect of the operation then under the decided cases they may be used as a rate basis for the collection of the instant tax."

Green v. The Western Union Telegraph Company, CCH FLORIDA TAX REPORTS ¶ 200-359, Supreme Court of Florida, June 29, 1960. Richard W. Ervin, Attorney General, Joseph C. Jacobs and Sam Spector, Assistant Attorneys General, for appellant. William A. O'Brejan of Ausley, Ausley & McMullen, J. H. Waters, of New York City, R. C. Barnett, of New York City, for appellee.

WISCONSIN

Foreign corporation engaged exclusively in interstate commerce with respect to Wisconsin held subject to Wisconsin tax on income derived from the State.

This was an action to review a decision of the Wisconsin Board of Tax Appeals holding plaintiff liable for income taxes for certain prior years. Plaintiff was engaged exclusively in interstate trucking operations with respect to Wisconsin, including deliveries in Wisconsin from out of state, loadings within Wisconsin for delivery out of state and through trucking. Plaintiff had no offices, terminals or other facilities in Wisconsin nor did any of its employees live in Wisconsin.

The Circuit Court of Dane County, citing the United States Supreme Court decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 3 L. Ed. 421, found that the Wisconsin tax did not violate the Interstate Commerce Clause since it was not a condition precedent to engaging in interstate commerce, and the formula employed fairly apportioned the income tax to the total income as measured by activities within Wisconsin. In addition, the Court found that the Wisconsin tax did not violate the Due Process clause because plaintiff's substantial activities in the State, 73.21% of all the miles traveled, constituted sufficient "nexus" to justify the imposition of the tax.

With respect to plaintiff's contention that the Wisconsin statutes taxed only strictly intrastate business, the Court concluded that "the schematic arrangement of the statutes clearly demonstrates a legislative intention to impose an income tax upon all income the situs of which is in Wisconsin, and for the State of Wisconsin to exercise to its fullest possible extent its rights to place an income tax upon the profits of interstate business." The Order of the Board of Tax Appeals was affirmed.

Moore Motor Freight Lines, Inc. v. Wisconsin Department of Taxation, CCH WISCONSIN TAX REPORTS ¶ 200-832, Circuit Court of Dane County, July 14, 1960.

state legislation

Louisiana — General withholding provisions have been enacted by Chapter 342 of 1960, effective January 1, 1961. Employers making payment of wages, on or after January 1, 1961, to resident and non-resident employees, will be required to deduct and withhold from such payments a tax equal to 1.5% of the amount by which the wages exceed the sum of the withholding exemptions and credits for dependents. Returns and payments will be due quarterly, on or before the last day of the month following the calendar quarter.

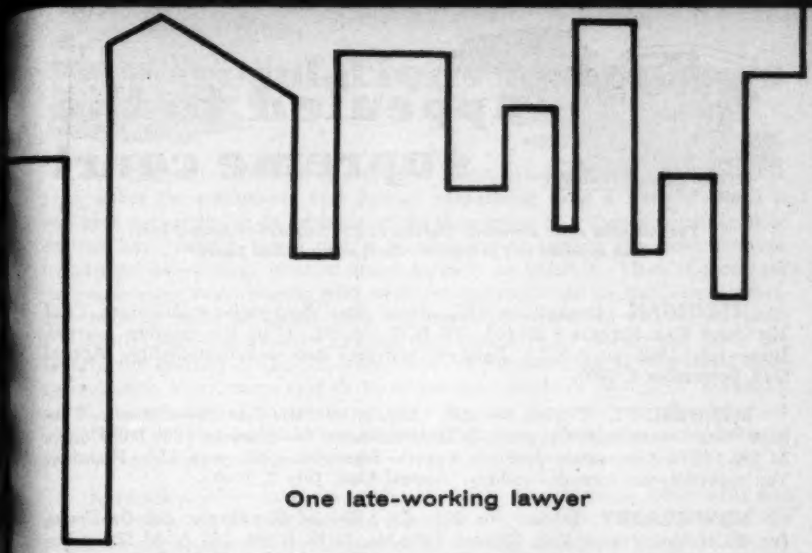
It is provided by Act 162 of 1960, effective as of January 1, 1961, that for the purposes of ad valorem taxation, raw materials, goods, commodities and personal property stored in transit in the state, while moving in interstate commerce are not to be treated as incorporated into the mass of the property in this state during the time that such raw materials, goods, commodities or personal property, received from outside of the state, are held by the owner in public or private storage to be shipped to a point outside the State of Louisiana, whether specified when transportation begins or afterward.

Chapter 342, Laws of 1960, provides that, effective as to taxable years ending after January 1, 1961, payment of the income tax in installments will no longer be permitted.

Nevada — Senate Bill 90, Laws of 1960, approved and effective March 9, 1960, provides that the president of a corporation need not be a director. Formerly the law required that the president be a member of the board of directors.

New Jersey — Chapter 51, Laws of 1960, enacted to provide for more uniform assessment of property, provides that, with respect to taxes on tangible personal property used in business due in 1962 and thereafter, the assessment date will be January 1, 1961, and each January 1 thereafter. Those owning tangible personal property used in business during any part of the twelve month period ending on the assessment date, will be required to file a return of such property on or before the following May 1. Provision is made for averaging the value of inventories owned during all or any part of the twelve month period. The first such return, which should be filed in duplicate, will be due on or before May 1, 1961 with respect to taxes payable in 1962.

South Carolina — House Bill 2233, Act 937, Laws of 1960, approved and effective May 16, 1960, provides that the notice of the meeting for dissolution should be published in a newspaper having a general circulation in the county in which the corporation has its principal place of business. Previously, publication was required to be made in a newspaper published in the county where the principal place of business was located or if no newspaper was published in that county, the notice was required to be posted on the court house door.



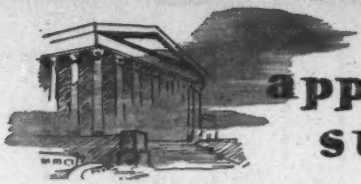
One late-working lawyer

If his client is going to start work on that out-of-state contract, qualification must be completed right away.

The lawyer started the job early enough. But getting information and forms from the state took longer than it should. And, well, he did forget to order enough certified copies of charter documents to take care of county recordings and he had to wait for the extras to arrive. And now, at the last minute, publication details have to be worked out. And transmittal letters to different state departments and the county clerk have to be prepared. And checks drawn. And . . . has every detail been taken care of?

By way of comparison, thousands of lawyers this year, and every year, will push all the detail connected with qualification over to CT. The initial information CT gives to lawyers (only) provides the data the lawyer needs on requirements and costs. CT services in qualification (for lawyers only) take care of every detail, in accordance with the lawyer's schedule, exactly as the lawyer directs.

You, if you are a lawyer, can get a no-cost, no-obligation quotation on CT qualification services at any CT office. You will be surprised to learn how low it is!



appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

MICHIGAN. Docket No. 387. *Armco Steel Corporation v. Michigan,* CCH MICHIGAN TAX REPORTS ¶ 200-091, 102 N.W. 2d 552. (The Corporation Journal, June—July 1960, page 353.) Business activities tax—constitutionality. **Appeal filed, September 6, 1960.**

MISSISSIPPI. Docket No. 233. *Mississippi State Tax Commission v. Tennessee Gas Transmission Company,* CCH MISSISSIPPI TAX REPORTS ¶ 200-110, 116 So. 2d 550. (The Corporation Journal, August—September 1960, page 13.) Franchise Tax apportionment formula—validity. **Appeal filed, July 8, 1960.**

NEW JERSEY. Docket No. 203. *Eli Lilly and Company v. Sav-On-Drugs, Inc.,* CCH NEW JERSEY TAX REPORTS ¶ 200-146, 31 N. J. 591, 158 A. 2d 528. (The Corporation Journal, April—May 1960, page 329); affirming 57 N. J. Super. 291, 154 A. 2d 650. (The Corporation Journal, February—March 1960, page 308.) Doing business—enforcement of contracts. **Appeal filed, June 20, 1960.**

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* Data compiled from CCH U. S. SUPREME COURT BULLETIN.

Discussions on Corporation Law

Ordinary Compensation Arrangements for the Closely Held Corporation, by R. T. Boehm. University of Cincinnati Law Review, Spring, 1960. page 157.

Judicial Attitude Toward Executive Compensation, by Norman I. Barron. University of Cincinnati Law Review, Spring, 1960, page 245.

Corporations—Deferred Compensation Plans—Validity of "Unit Plan" of Measuring Reasonable Value of Services Rendered, New York University Law Review, March, 1960, page 838.

The Corporate Guaranty, by Arthur M. Kreidmann. 13 Vanderbilt Law Review, December, 1959, page 229.

Fifteen Years Survey of Corporate Developments, 1944-1959, by Miguel a. de Capriles. 13 Vanderbilt Law Review, December, 1959, page 1.

Initial Capitalization and Financing of Corporations, by Chester Rohrlich. 13 Vanderbilt Law Review, December, 1959, page 197.

Choosing the Form of Organization, by Leonard Sarner. 8 University of Kansas Law Review, May, 1960, page 522.

Foundations Used As Business Devices, by Howard L. Oleck. 9 Cleveland-Marshall Law Review, May, 1960, page 339.

regulations and rulings

All States — Where it is desired to effect, before the end of the calendar year, either the withdrawal of a foreign corporation from a state in which it had been authorized to do business or the dissolution of a domestic corporation, counsel have usually found that it is advisable to initiate the dissolution or withdrawal proceedings in most states as early as possible. Thus, if there are time-consuming requirements with which compliance must be had, ample provision may be made to satisfy such requirements before the end of the year. Frequently, such requirements call for the preparation of income and other tax reports, the auditing of the corporate books, or the obtaining of certificates from various state departments that all taxes due the state have been paid. Inasmuch as, in some instances, a month or more may be consumed in effecting such compliance, it is advisable to investigate and institute dissolution or withdrawal proceedings, wherever possible, well in advance of the close of the year.

Kentucky — The sales tax applies to retail sales of signs, show cards and posters, and to charges for painting signs, show cards and posters whether the materials are furnished by the painter or by the customer. (Opinion of the Attorney General, CCH KENTUCKY TAX REPORTS ¶ 200-300)

Real estate is not subject to the sales and use tax law. Unless additional outside activities which are subject to the tax are carried on in connection with a real estate business, such business activities are not subject to the tax. (Opinion of the Attorney General, CCH KENTUCKY TAX REPORTS ¶ 200-301)

The sales tax does not apply to charges for either intrastate or interstate transportation of persons and goods. However, the transportation company must pay the tax on purchases of tickets, paper forms, parts and equipment used in its operations. (Opinion of the Attorney General, CCH KENTUCKY TAX REPORTS ¶ 200-292)

Expenses which are incurred in one tax year for which no deduction is taken and which are reimbursed in another tax year will not be considered income for the year in which the reimbursement is made. However, if the deduction is claimed, then the reimbursement must be considered as income for the year in which it is received. (Opinion of the Attorney General, CCH KENTUCKY TAX REPORTS ¶ 200-293)

Nebraska — When a domestic corporation owns tangible personal property which is located partly within and partly without the state, only that part located in Nebraska on the assessment date is taxable unless the property was removed from the state with the intention of avoiding Nebraska taxation or unless such property is brought into the county or state between January 1 and July 1 of any year and it has not been assessed in another county or state. (Opinion of the Attorney General, CCH NEBRASKA TAX REPORTS ¶ 24-641)

New Jersey — The gain on a sale or exchange of assets in a complete liquidation, which comes within the provisions of Sec. 337, Internal Revenue Code, and is not recognized for federal income tax purposes, is not included in "entire net income" for the New Jersey corporate business tax. (Opinion of the Attorney General, CCH NEW JERSEY TAX REPORTS ¶ 200-173)

some important matters

For October and November

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Alabama — Quarterly Withholding Tax due on or before October 31.

Arizona — Quarterly Withholding Tax due on or before October 31.

California — Quarterly Retail Sales Tax due on or before October 31.

Colorado — Quarterly Withholding Tax due on or before October 31.

Connecticut — Quarterly Retail Sales Tax due on or before October 31.

Delaware — Withholding at Source Returns due October 31.—Domestic and Foreign Corporations paying compensation to Delaware employees.

Georgia — Certified Statement for Registration due on or before November 1.

Indiana — Quarterly Gross Income Tax and Withholding Tax due on or before October 31.

Iowa — Quarterly Retail Sales Tax due on or before October 31.

Kentucky — Quarterly Withholding Tax due on or before October 31.

Maryland — Quarterly Withholding Tax due on or before October 31.

Missouri — Quarterly Retail Sales Tax due on or before October 15.

Nevada — Quarterly Retail Sales Tax due on or before October 31.

New York — Second Installment of Franchise (Income) Tax of Business Corporations due on or before December 1.

North Dakota — Quarterly Retail Sales Tax due on or before October 31.

Oregon — Quarterly Wtihholding Tax due on or before October 31. Report of Abandoned Property due on or before November 1.

Pennsylvania — Quarterly Selective Sales Tax due October 31.

Rhode Island — Semi-Annual Report to Division of Industrial Inspection due during October.

South Dakota — Quarterly Retail Sales Tax due on or before October 15.

Utah — Quarterly Retail Sales Tax due on or before October 30. Quarterly Withholding Tax due on or before October 31.

Vermont — Quarterly Withholding Tax due on or before October 31.

West Virginia — Quarterly Business (Gross Sales) Tax due October 31.

Doing Business In Other States: Taxation Problems

[An address by Edward Roesken, Editor of The Corporation Journal, before the Sixth Annual Institute of House Counsel, held in Madison, Wisconsin. Our thanks to the Institute for permission to reprint Mr. Roesken's discussion of this important subject — The Corporation Trust Company.]

The field of law known as "Doing Business" is divided into three parts:

One area is that of doing business in other states from the standpoint of jurisdictional problems.

A second area is that of doing business in other states from the standpoint of qualification problems — the area which relates to activities which may require an unlicensed foreign corporation to obtain authority from a state to do business as a foreign corporation.

The third area is that of doing business in other states from the standpoint of taxation problems — that is, the extent to which an unlicensed foreign corporation may be liable to the payment of recurring state taxes.

Sir William Blackstone, in his famous Commentaries, devotes less than ten pages to the subject of taxes. Blackstone, as may be expected, makes no mention of interstate commerce, foreign commerce, net income taxes or situs of intangibles and the word "nexus" seems to have escaped him entirely.

Compare his ten pages with one of the modern State Tax Reporters which comprises 60 volumes, weighs over 200 lbs. and consists of about 50,000 pages.

From these pages we distill our conclusions regarding the doing business problems of unlicensed foreign corporations relating to recurring state taxes. We will endeavor to determine how far such a company can go without becoming subject to these state taxes, which are Franchise Taxes, Income Taxes, Property Taxes, Occupation License Taxes, Sales and Use Taxes.

Blackstone makes mention of several different types of taxes which are familiar to us. Among these are the "land tax," which we know as the tax on real property, ad valorem taxes on imports and exports and on personal property generally, stamp taxes and malt and salt taxes. There is a hint of the beginnings of intangible taxes in his reference to taxes "on persons according to their reputed estates."

I AD VALOREM PROPERTY TAXES

(a) Real Estate Taxes

Let us turn first to a tax which has been so long established that there is little controversy regarding it. This is the tax on real estate. It goes back beyond Blackstone's time.

An unlicensed foreign corporation which owns real property in a state would, of course, be subject to ad valorem property taxes upon it if it is owned on the assessment date. It is the fact of ownership which controls the question of real estate property tax liability. This liability is not affected by the question of whether the corporation is authorized to do business in the state or whether it should be authorized to do business.

Most of the states have a definite assessment date—often January 1. It is customary for sellers and purchasers to pro-rate real estate taxes. As a practical matter, therefore, there would be no advantage in delaying or accelerating the date for the closing of title for the purchase or sale of real estate.

If there is any area in the real estate taxation field where advantage might be obtained when acquiring real estate, it would exist in those states in which there is exemption of new industrial plants for a period of time. Practically all of the Southern states offer such inducements, in some instances for a period of several years, to new industries from the time they are established.[1]

(b) Tangible Personal Property Taxes

Practically all states levy ad valorem property taxes on tangible personal property within the state. The exceptions are Delaware, Hawaii, New York and Pennsylvania.

Liability to property taxes arises by reason of a mere presence of tangible personal property within a taxing jurisdiction on the date as of which property is assessed. Liability is not, therefore, affected by a question of whether a foreign corporation is authorized to do business or not.

If, as in many states, the assessment date is January 1, a corporation owning tangible property in the state on that date, will be expected to report such property to the proper taxing officials and to pay the property taxes when due.

In some states, there is no specific assessment date, and assessment is made between two specific dates, sometimes covering a period of two or three months. Such states are Arizona, Kansas, Nevada and South Dakota.

If taxable tangible personal property owned by a foreign corporation has been brought into a state and has come to rest before the assessment date, it may be expected that the corporation will be liable for property taxes as of that date.

As an assessment date nears, it is not unusual for a corporation to reduce shipments of inventories into a taxing state, or to withdraw portions of its stocks in that state until after the assessment date. However, in many states merchants are required to report stocks on an average basis during the year preceding the assessment date, and the size of stock on an assessment date is not a determining factor in such states.[2]

Doubt may arise as to property tax liability if the property is merely passing through the state in interstate commerce on the assessment date, having been previously ear-marked for a destination in still another state.[3]

There is a wide variation of tax rates and also a wide variation in percentages of assessment used. Local customs govern assessment in many jurisdictions and only an investigation into the general practices in reporting taxable property for assessment can prevent a corporation from being discriminated against if it adheres strictly to the letter of the law, rather than following the general local practice in a given jurisdiction.

As to property stored in a warehouse, ordinarily the property owner is expected to report it, although in some states the burden is placed upon the warehouseman to report the property stored, giving the name of the owner. In recent years there

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[1] Alabama, Arkansas, Delaware, Kentucky, Louisiana, Maryland, Mississippi, Oklahoma, Rhode Island, South Carolina and Tennessee.

[2] Jurisdictions to be considered are Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Iowa, Louisiana, Maine, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Virginia, Washington and Wyoming.

[3] *Champlain Realty Co. v. Town of Brattleboro*, 260 U. S. 366, 43 S. Ct. 146 (1922); *Export Leaf Tobacco Co. v. Los Angeles County*, 202 P. 2d 662 (1949); *Archer-Daniel-Midland Co. v. Board of Equalization of Douglas County*, 48 N. W. 2d 756 (1951).

has been a trend toward exemption of property in transit or in storage. Twenty-two states provide for such exemption in varying degrees.

It is possible that a corporation may be in a position to make use of the facilities of one or more of the Foreign Trade Zones. At the present time these are located in New Orleans, New York, San Francisco and Seattle. These operate under grants of authority of the Federal Government[4] in a manner similar to that of the "free ports" in other parts of the world. In such a Zone, foreign goods, wares, merchandise and materials may be stored, sold (including auctioning), exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign and domestic merchandise, or otherwise manipulated or manufactured into a finished product, all free from Customs control and before the payment of duties. Duty is paid only when goods move from the Zone into the United States, and then only for the amount moved in, calculated on the saleable product resulting from processing, if that is involved. Such goods do not come within the orbit of state taxation until they leave the Foreign Trade Zone, where they may first be held for indefinite periods.

An unlicensed foreign corporation may, therefore, serve to reduce its liability for personal property taxes in a given year to the extent that (1) it can control the amount of property in a state on the assessment date, (2) it can take advantage of provisions of states which exempt property in transit or in storage or (3) it can delay taxation through use of Foreign Trade Zones.

(c) Intangible Personal Property Taxes

During the past two decades a number of trends have appeared in connection with the taxation of intangibles.

There has, for instance, been a strong trend toward the classification or segregation of intangibles and their taxation at comparatively low rates in sixteen states. These rates are low when contrasted with the rates applied in the same states in the taxation of real estate and tangible personal property. This preferred treatment has led to the very general reporting of such intangibles by their owners, resulting in substantial tax revenue to the states and their subdivisions.

In contrast to this, there are twenty jurisdictions where intangibles are exempt by legislation from all ad valorem property taxation.

In the remaining states, there is one group where there is a partial classification of certain types of intangibles at relatively low rates and the other intangibles are ostensibly taxable at the high local ad valorem rates applicable to real estate and tangible personal property.

The question of the liability of an unlicensed foreign corporation to the payment of taxes on intangibles is an interesting one. Usually, certain activity on the part of the corporation is necessary before liability arises. For instance, the United States Supreme Court has held that a Delaware corporation, with no activities in Delaware, which had its principal office in West Virginia, could be regarded as taxable upon its intangibles in West Virginia to the extent that its intangibles were not taxed elsewhere.[5] Here there was a "business situs" given to the intangibles in West Virginia. Ordinarily, the corporation must have an office within the taxing state or have some other activities there which would give rise to jurisdiction over it similar to the type of jurisdiction which would give rise to service of process upon a foreign corporation.

If a corporation is active in its state of incorporation and also has a business

[4] Foreign Trade Zones Act of 1934, as amended.
[5] *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773 (1936).

office in another state, it is possible that its intangibles may be taxed in both jurisdictions. The Supreme Court of the United States has remarked that the fact that the property and business of a North Dakota corporation "were entirely in another state did not make it the less subject to taxation in the state of its domicile."[6] The tax involved was a property tax on stocks and bonds owned by the corporation. In this case the court observed that "the Fourteenth Amendment (to the Federal Constitution) does not prohibit double taxation."

Usually, taxation of intangibles can be expected if they arise out of or are incident to property owned by a business conducted in the taxing state.[7] However, it has been held that a foreign corporation was not taxable on accounts receivable arising from local sales, where shipments were effected by delivery to a common carrier before reaching the taxing state.[8]

II OCCUPATION LICENSE TAXES

In addition to the initial taxes payable upon the organization of a domestic corporation or the qualification of a foreign corporation, and the "annual" franchise taxes paid for the privilege of existing as a domestic corporation or for the right to do business within a state by a foreign corporation, there are certain annually recurring state, county and municipal "privilege" taxes imposed in each state for the privilege of engaging *in a particular type of business* within the state, county or city.

In the Southern states, this type of taxation will be found imposed upon almost every conceivable occupation or business. It is a source of considerable revenue to states, counties and municipalities.

In the rest of the states, however, the number of occupations taxed in this way is comparatively small and many businesses are not so taxed.

The state-wide occupation license requirements are imposed by state legislation, as are most of the county-wide requirements, and much of the collection and administration of these two types falls upon county officials, who, when collecting state license taxes, act as agents of the state.

The Supreme Court of the United States and the State Courts have uniformly ruled that an unlicensed foreign corporation, furthering interstate commerce, may not be subjected to such state or local occupation license taxes.[9] Rulings of the Supreme Court go back many years. In 1946 the Supreme Court refused to reverse its stand in the long line of "Drummer cases" extending as far back as 1887,[10] holding that a person engaged in interstate commerce could not be subjected to a local occupation license tax.[11]

Therefore it may be said that if an unlicensed foreign corporation merely sends salesmen into a state to solicit orders to be filled by the shipment of the goods ordered across state lines in interstate commerce direct to the purchaser, payment of state or local occupation license taxes should not be regarded as required.[12]

This disposition of an occupation license tax problem involving interstate commerce and the exaction of a privilege

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[6] *Cream of Wheat Company v. County of Grand Forks*, 253 U. S. 325 (1920).

[7] *Colgate-Palmolive-Peet Co. v. Davis*, 196 Ga. 681, 27 S. E. 2d 326 (1943); *Parke, Davis & Co. v. Atlanta*, 200 Ga. 296, 36 S. E. 2d 773 (1946).

[8] *Suttles v. Owens-Illinois Glass Co.*, 206 Ga. 849, 59 S. E. 2d 392 (1950).

[9] *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592 (1887); *Corson v. Maryland*, 120 U. S. 502, 7 S. Ct. 655 (1887); *Stockard v. Morgan*, 185 U. S. 27, 22 S. Ct. 576 (1902); *Nippert v. Richmond*, 327 U. S. 416, 66 S. Ct. 586 (1946).

[10] *Robbins v. Shelby County Taxing District, supra*, note 9.

[11] *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 586 (1946).

[12] See authorities in *McGoldrick v. Berwind-White Company*, 309 U. S. 55-57 (1940), particularly note 11.

tax is consistent with the Supreme Court's modern holding in 1951 that a foreign corporation, engaged strictly in interstate commerce, was not subject to the Connecticut Corporation Franchise Tax, based upon apportioned net income, as revealed in the case of *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951).

Many occupation license taxes are renewable before January 1. As there is little pro-rating of such taxes, a postponement of business activity and of the securing of the original license until after January 1 will eliminate occupation tax liability for the year prior to January 1. Like savings are available on discontinuance of business.

III FRANCHISE TAXES

Franchise taxes are normally exacted for the privilege of "doing business" within a state. Therefore, if an unlicensed foreign corporation is not doing *intrastate* business, it should not be regarded as subject to a franchise tax.

A company engaged strictly in futhering *interstate* commerce has been held by the Supreme Court not to be subject to a franchise tax measured by apportioned net income.[13] The states which impose franchise taxes of this type are Connecticut, Massachusetts, Montana, New Jersey, New York and Vermont.

Turning to states which impose franchise taxes on bases other than apportioned net income, it has been held by the Supreme Court that a franchise tax, so based, may not be imposed upon a foreign corporation engaged strictly in interstate commerce.[14]

There are, however, definitions in a number of state corporation franchise tax laws which indicate an intention to tax corporations which own property within the taxing state.[15] These are California, Connecticut, New Jersey, New York, Oklahoma, Oregon and Vermont.[16]

IV FOREIGN COMMERCE

Let us consider for a moment foreign commerce and the possible liability of an unlicensed foreign corporation to payment of state or local taxes where foreign commerce is furthered.

States have not been active in pursuing corporations engaged strictly in foreign commerce with a view of collecting franchise taxes from them. There is perhaps only one decision which indicates that a state may not impose a franchise tax upon a corporation where its capital employed in the state consisted exclusively of imported goods in the original packages in which they were brought into the state.[17] The fact that the corporation was qualified and that the franchise tax could not be imposed under such circumstances may have dissuaded states from going out of their way to attempt to tax corporations engaged in foreign commerce.

As to property taxes on property imported from a foreign country, the Supreme Court has held that goods sent to a plant in this country for manufacture, could not be subjected to property taxes preliminary to such manufacture.[18]

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[13] *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951).

[14] *Ozark Pipeline Corp. v. Monier*, 266 U. S. 555, 45 S. Ct. 184 (1925); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); *Alabama v. Transcontinental Gas Pipe Line Corp.*, — So. 2d — (1960).

[15] *California*: Sec. 23101, Revenue and Taxation Code; Regulation 23101; *Connecticut*: G.S., 1958, Sec. 12-213; *New Jersey*: R.S. 54: 10A-2; *New York*: Tax Law, Article 9A, Sec. 209(2); Article 9, Tax Law, Sec. 182; *Oklahoma*: O.S. Title 68, Ch. 17, Sec. 644.3; *Oregon*: O.R.S., Sec. 317.010(7); *Vermont*: V.S., Sec. 949(III).

[16] The California, Connecticut, New York, Oregon and Vermont taxes are measured by apportioned net income.

[17] *Anglo-Chilean Nitrate Sales Corporation v. State of Alabama*, 288 U. S. 218, 53 S. Ct. 373 (1933).

[18] *The Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 65 S. Ct. 870 (1945).

There are a few decisions holding that certain city taxes could not be imposed where foreign commerce was furthered.[19]

Generally, therefore, it is likely, where foreign commerce is the only activity which is engaged in, that the states will leave corporations, carrying on such activities, pretty much alone, so far as the collection of state taxes is concerned, bearing in mind, of course, those states which have, by legislation or regulation indicated they regard corporations engaged in foreign commerce as subject to their net income taxes. These states are Arizona, California, Georgia, Hawaii, Louisiana, Mississippi, Oregon, Pennsylvania, South Carolina and Utah.[20]

V NET INCOME TAXES

The states may be divided into two groups today — those which attempt to tax the net income of unlicensed foreign corporations engaged in furthering interstate commerce only and those which make no attempt to reach out and tax such companies.

In the taxing group there are twenty-four states.[21] The balance of the states which impose such net income taxes other than franchise taxes presently seem to be satisfied to collect their taxes without seeking to tax interstate companies. In part, this may be because if they did so, some foreign corporations now paying their taxes might consider moving to a state which does not have a net income tax or which, if having a net income tax, does not attempt to tax such companies.

There was a time, prior to 1930, when it seemed well established that a state could not impose a net income tax upon unlicensed foreign corporations engaged strictly in interstate commerce. Behind this concept were decisions of the Supreme Court of the United States involving the Massachusetts Excise Tax.[22]

Minnesota in its original 1933 net income tax reached out to tax foreign corporations whose business in Minnesota consisted exclusively of interstate commerce.[23] California in 1937 enacted a separate Income Tax Act to reach such interstate corporations.

Soon after other states such as Georgia, Colorado and Arkansas amended their laws to follow the lead of Minnesota and California. The California Income Tax Act of 1937, designed to tax income of interstate companies, upheld in the State Supreme Court primarily upon the authority of service of process cases, was taken up to the Supreme Court of the United States and affirmed in a brief *per curiam* opinion in 1946.[24]

In the meantime the Spector Motor Service case,[25] which had been begun in the early 1940's, was on its way through the courts. In 1951 in this case the Supreme Court of the United States laid down the rule that a state may not tax a foreign corporation for the *privilege* of doing business within the state, when the business consists solely of interstate commerce. The tax in question was the Con-

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[19] *Texas Transport & Terminal Company, Inc. v. City of New Orleans*, 264 U. S. 150, 44 S. Ct. 242 (1924); *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414, 60 S. Ct. 664 (1940); *Gdynia American Line Inc. v. Taylor et al.*, 293 N.Y.S. 613 (1934).

[20] Ariz Rev Stat Sec. 43-101(aa); Cal Rev & Tax Sec. 23040; Colo Rev Stat Sec. 138-1-3(1); Ga Code Sec. 92-3113; Hawaii Rev Laws Sec. 121-4-(c)(1); La Reg ITR 31.3; Minn Stat Sec. 290.03; Miss Code 9220-12 (1)(a); Ore Rev Stat Sec. 318.020(2); Pa Act of Aug. 24, 1951, Sec. 3; SC Code Sec. 65-222.1 as am by Acts 1960, H.B. 1865, Sec. 4; Utah Code Ann Sec. 59-13-66, as added by Laws 1959, c. 13.

[21] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Wisconsin.

[22] *Cheney Brothers Company v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925).

[23] Laws of 1933, c. 405.

[24] *West Publishing Co. v. McColgan*, 166 P. 2d 361 (1946), affirmed 328 U. S. 823, 66 S. Ct. 1378, 329 U. S. 822, 67 S. Ct. 35 (1946).

[25] *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951).

necticut franchise tax, measured by net income apportioned to the state.

In 1959 the Supreme Court held in the *Northwestern States Portland Cement Company* case,[26] "that net income from interstate operations of a foreign corporation may be subject to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same."

The court distinguished the Georgia and Minnesota levies before it, neither being imposed for the privilege of engaging in interstate commerce, from an income tax imposed for such a privilege. It observed that "it is beyond dispute that a State may not lay a tax on the privilege of engaging in interstate commerce. *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951)."

There are six states which impose net income taxes for the privilege of doing business.[27] Only seven states are left which could apparently take advantage of the *Northwestern States* case, but have not done so.[28]

Federal Interstate Income Law

Injected into the state net income tax picture is the Federal interstate income law of 1959.[29] This bars a state or political subdivision from imposing an income tax on income derived from interstate commerce, if the only business activities within the taxing state are limited to certain specified types of solicitation of orders. The Act does not apply to domestic corporations of a state.

The Federal interstate income law is narrow in scope, exempting from state and local income tax only corporations which merely solicit orders within the taxing state approved or rejected outside the taxing state, and followed, upon approval, by shipment or delivery from a point outside that state across state lines to the local customer.

The Act is uniform in that it attempts to restrict certain states in the scope of their net income taxation of foreign corporations. Doubt has been raised in some quarters as to its constitutionality and quite possibly it may be tested before long. In the meantime, many of the states which have been active in reaching the income of unlicensed foreign corporations engaged in interstate commerce, will no doubt be guided by it. Thus, the matter will probably rest until at least July 1, 1962, when a report is to be made to Congress which may thereafter consider legislation providing uniform standards to be observed by the states in imposing income taxes on interstate receipts of unlicensed foreign corporations.

The Supreme Court, in the *Spector* case, ruled that an income tax imposed for the privilege of doing business cannot be applied to a company engaged strictly in interstate commerce. There is no distinction made in the Federal interstate income law between net income taxes which are imposed for the privilege of doing business and those which are not.

It is conceivable, but perhaps somewhat unlikely, that Congress may eventually extend the scope of the present Federal interstate income law to embrace all interstate commerce. As to state net income taxes, the result of such legislation would be to restore their scope to the limits generally applying to business corporations in the middle 1920's, when interstate commerce was regarded as more or less sacrosanct.

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[26] *Northwestern States Portland Cement Company v. Minnesota; Williams v. Stockham Valves & Fittings, Inc.*, 358 U. S. 450, 79 S. Ct. 357 (1959).

[27] Connecticut, Massachusetts, Montana, New Jersey, New York and Vermont. Tennessee Ch. 252, Laws of 1959, designed to tax corporations exclusively in interstate commerce "upon the privilege of being in receipt of or realizing net earnings in Tennessee" was held unconstitutional in June, 1960, in *Jack Cole Co. v. McFarland*, by the Tennessee Supreme Court.

[28] Delaware, Iowa, Missouri, New Mexico, North Dakota, Oklahoma and Rhode Island.

[29] Public Law 86-272; Senate 2524, signed by the President September 14, 1959.

More likely to result from the Committee's recommendations, would be legislation related to methods of apportionment in an endeavor to bring about uniformity.

It has been suggested that the Committee might well go beyond consideration of state net income taxes only and explore all state taxes to which business corporations and others engaged in interstate commerce are subject.[80]

VI GROSS INCOME TAXES

Strictly speaking there are only three states which impose a gross income tax. These are Indiana, Washington and West Virginia. A peculiarity of these taxes is that there is no provision for allocation and, in reporting, taxable gross income from state sources is segregated.

Considerable litigation has arisen in connection with these taxes. Gross income taxes have been held not to apply to gross receipts from interstate commerce.[81] Generally, it may be said that foreign corporations which are engaged only in interstate business do not report and pay such a tax, although they may be occasionally approached by these states to establish that interstate business only is transacted.

The Michigan business receipts tax was recently held to be an income tax by the Michigan Supreme Court.[82] The provision for an apportionment formula was regarded as distinguishing this tax from the Indiana gross income tax. The Northwestern States Portland Cement Company decision was found controlling. The court discerned parallels in Minnesota's use of the Massachusetts apportionment formula in its income tax and in Michigan's use of it in its business receipts tax. Thus, companies carrying on business in interstate commerce only in Michigan will likely be regarded as taxable to the extent that the Northwestern Cement Company decision applies, as affected by the Federal Interstate Income Law.

VII RETAIL SALES TAXES

In 1934, New York City was the first jurisdiction to impose a retail sales tax, as we know it. Soon after, states began to impose statewide sales taxes until today 34 states and the District of Columbia impose such taxes. In a number of states, counties or cities, or both, impose retail sales taxes.[83]

Today it is accepted that the retail sales tax applies ordinarily to sales of taxable tangible personal property which is in the taxing state at the time of sale.

Soon after the New York City Sales Tax local law was imposed in 1934, a question arose regarding the taxability of orders placed in New York City with department stores, where shipment was made to the purchaser located outside of New York City. The city ruled that such transactions were not taxable. Out of this has grown the general attitude of the states which impose retail sales taxes of not taxing similar transactions where goods are shipped out of the state immediately after purchasing is effected.[84]

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[80] Congressional Regulation of State Taxation of Interstate Commerce, Paul F. Mickey and George B. Mickum, III, North Carolina Law Review, February, 1960, Vol. 38, No. 2, page 119, 153.

[81] *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 58 S. Ct. 913 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 59 S. Ct. 325 (1939); *James v. United Artists Corp.*, 305 U. S. 410, 59 S. Ct. 272 (1939).

[82] *Armco Steel Corporation v. Michigan*, 102 N. W. 2d 552. Appeal filed in the Supreme Court of the United States, July 8, 1960.

[83] Certain counties and cities in Alabama, California, Illinois, Louisiana, New York and Utah; certain cities only in Alaska, Colorado, Mississippi, New Mexico, and Virginia.

[84] The rules governing this type of exemption, curiously enough, are not usually found in the sales tax statutes, but are more often found in the regulations. Examples are New York City: Reg. Art. 70(3); Alabama, Rule I, 14-012; Arkansas: Art. 27; Colorado: Rule No. 45; Connecticut: Reg. No. 30.

The *Norton* case,[35] which went up to the Supreme Court from Illinois, gave an indication of how far the Supreme Court is prepared to go in permitting sales to be gathered into the base of a tax. There, all sales utilizing an Illinois branch office and warehouse, either in receiving the orders or distributing the goods, were regarded as subject to the tax.

It was in 1940 that the New York City Sales Tax first came before the Supreme Court of the United States in the *Berwind-White* case.[36] There a foreign corporation with an office in the city was held required to collect the city sales tax on coal sent into the city for delivery there, pursuant to contracts entered into in the city. This involved the sales tax before the enactment of the city use tax.

At the time of the *Berwind-White* case, the court also rendered another opinion involving the New York City Sales Tax in which it was held that the tax might be imposed upon sales which were solicited in the city and where possession was transferred to the buyer in the city, although the orders were subject to approval at an office in another state and where remittances were made to that office.[37] In that case the Supreme Court also ruled that sales made by an exclusive agent in New York City for a foreign corporation, accepted out of the State of New York and followed by shipment of machinery ordered direct to the purchaser in New York City, could give rise to liability on the part of the principal to collect and pay the retail sales tax. This foreshadowed the *Scripto* case,[38] involving the Florida use tax by twenty years.

VIII USE TAXES

A forerunner of the use tax was the gasoline tax, collected by the distributor. It was because of the upholding of the gasoline tax that the Supreme Court, when the Iowa Use Tax came before it in 1944, said that "to make the distributor the tax collector for the state is a familiar and sanctioned device."[39]

Frequently, an unlicensed foreign corporation seller merely ships goods into the taxing state and the use tax applies. The problem of the extent to which such a seller corporation may be obliged to collect and remit the use tax from the purchaser, who is primarily liable for the tax, is controlled by the extent of its contacts with the state.

In early 1960, in *Scripto, Inc. v. Carson*,[40] the Supreme Court of the United States ruled that an unlicensed foreign corporation was required to collect the Florida use tax on merchandise sold to Florida consumers through independent brokers. The decision was rendered in connection with Florida use tax provisions which gave rise to liability on the part of the seller where the seller effected sales to Florida consumers through "representatives, indirect representatives, manufacturers agents, or by the distribution of catalogs or other advertising matter or by any other means whatsoever."

An examination of the requirements of the states imposing use taxes reveals that Florida's language would require less activity to call for the collection of the use tax than any other state. Particularly noteworthy is the use of the words "or by any other means whatsoever." No other state has employed comparable all-embracing language, although in many the specific activities mentioned approach it.

The Scripto decision assumes far-reaching importance because of the

[35] *Norton Co. v. Dept. of Revenue*, 340 U. S. 534, 71 S. Ct. 377 (1951).
[36] *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 338 (1940).
[37] *McGoldrick v. Felt & Tarrant Manufacturing Co.*, 309 U. S. 70, 60 S. Ct. 608 (1940).
[38] *Scripto, Inc. v. Carson*, 80 S. Ct. 619 (1960).
[39] *General Trading Co. v. State Tax Commission*, 322 U. S. 335, 64 S. Ct. 1028, 1039 (1944).
[40] 80 S. Ct. 619.

extension of the Florida use tax requirements to draw into the state as tax collectors foreign corporations and others with minimum activities related to the state.

There are six states which use the distribution of catalogs as an activity which would draw the seller into the state and make it liable for the collection of the tax. These are Alabama, Florida, Georgia, Pennsylvania, South Carolina and South Dakota. Missouri and Rhode Island use the expression "other advertising matter" and perhaps should be classified with these states. Rhode Island goes so far as to include "telephone solicitations."

The rest of the states which impose use taxes outline activities which are more generally understood as giving rise to the necessity of use tax collection on the part of the seller, such as the existence of a local warehouse, a sales room, an office or other place of business and the presence of salesmen and solicitors.

Only four states, Arizona, Arkansas, Oklahoma and Washington, appear to have no enumeration of such local activities which would be regarded as giving rise to use tax collection liability.

The general conclusion may be reached that the *Scripto* case will be regarded by the use tax states as permitting them to apply their own statutes to the limit in attempting to reach foreign sellers and require their collection of the use tax.

It is a practical question, however, how much investigation the average state may actually make in enforcing the use tax with respect to companies which have little connection with the state—particularly those which limit their activities to the distribution of catalogs or other advertising material.

Enforcement of the use tax has always been difficult. No doubt there are many sellers who come within the text of the use tax law who will defer compliance until there are decisions rendered which relate more clearly to their own situations, particularly where their contacts with the state are negligible and the nexus may be tenuous.

Practically every state imposing a use tax requires the purchaser to report the use tax if the vendor does not collect it and report it.

Where a seller's only contacts with a state are with purchasers by mail, telephone or telegraph, it is not unusual for the seller to be asked by the purchaser to collect and remit the use tax, in order to relieve the purchaser of this obligation. With the *Scripto* case in mind, there may be less reason for a seller to be reluctant to comply under such circumstances.

It is possible that if the states which impose use taxes should become very aggressive in their enforcement of collection, there might be clamor for a Federal act similar to the Federal interstate income law.[41] There is a distinct parallel between the state net income tax requirements as related to those engaged in interstate commerce and the use tax requirements.

IX TAX BARRIERS

(a) January 1—A Decisive Date

January 1 is a significant date for corporations where the following corporate procedures are under consideration: (1) Incorporation; (2) Qualification to do business; (3) Withdrawal from foreign states; (4) Dissolution.

In a number of states, the time when these events are concluded has a definite bearing upon the state taxes to be paid during the year beginning January 1.

(b) Incorporation and Qualification

For instance, if a company is incorporated or obtains authority to do business in several states—all shortly prior to January 1—it may be required to pay substantial state taxes in the following

[41] Public Law 86-272. Such use tax bills have been introduced. (HR 12235; S 3549).

year, beginning January 1, to its home state or to other states, or perhaps to both, which would not have been payable for that year had its incorporation and such qualification been delayed until after January 1.

Usually investigated are state franchise taxes, income taxes, ad valorem property taxes, chain store and other occupation license taxes. Since there are forty-five states where January 1 is a significant date, and which have a bearing upon one or more of the taxes enumerated, and only five states where this date has little or no importance,[42] it will be understood why it is customary for counsel to inquire as to the feasibility of postponement of incorporation or qualification, or both.

Perhaps the ten states where January 1 would be of most interest, in the approximate order of their importance, are Georgia, Maryland, Virginia, Iowa, Louisiana, Mississippi, Alabama, Colorado, Kentucky and Missouri.

(c) Withdrawal and Dissolution

Likewise, similar savings related to the coming year may be available, where the formal withdrawal of foreign corporations is accelerated so as to be effective before January 1, or where the dissolution of a corporation is accelerated so as to be completed before January 1.

Coupled with this proper avoidance of taxes is the elimination of the time-consuming preparation and filing of the corresponding tax reports.

(d) Other Decisive Tax Dates

In reality, the first of each month should be given consideration in the same way, to learn if any savings can be effected by delaying or accelerating the date of incorporation, qualification, dissolution or withdrawal.

After January 1, July 1 is the most significant date. The states where this date is important for incorporation or qualification are Alabama, Arkansas, Florida, Georgia, Kansas, Maine, Tennessee, Washington and Wyoming. In Maine, the franchise tax of domestic corporations is also considered.

Where withdrawal or dissolution are involved, Florida, Kansas, Maine, Tennessee, Washington, West Virginia and Wyoming are important.

(e) Merger and Consolidation

Where merger or consolidation is contemplated, much the same consideration is given to December 31 and June 30, and other fiscal year closings, with a view of effecting tax savings. Franchise taxes are perhaps most frequently considered in this connection. The filing of merger or consolidation documents is usually made, wherever feasible, before the date on which a new franchise tax will accrue, thus avoiding payment of one or more franchise taxes which would otherwise be due from merged or consolidated companies active in the taxing state.

X GENERAL

We have come a long distance since the 1920's where interstate commerce is involved with respect to state taxation. In those earlier years, interstate commerce was regarded as immune from state taxation where business corporations were concerned.[43] Furthering interstate commerce only was then not regarded as "doing business."

In those years, statutes were either held invalid or were held unconstitutional as applied to interstate corporations.[44]

To be mentioned parenthetically in this connection is a section of the Federal Social Security Act of 1935.[45] This section is quite as unique as the Federal

[42] Illinois, Maine, Nebraska, Nevada and Wyoming.

[43] *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918); *The Macallen Co. v. Massachusetts*, 279 U. S. 620, 49 S. Ct. 432 (1929); *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 45 S. Ct. 525 (1925).

[44] *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918); *Ozark Pipeline Corp. v. Monier*, 266 U. S. 555, 45 S. Ct. 184 (1925).

[45] Section 906 of Title IX, now Sec. 3305(a), Internal Revenue Code.

Interstate Income Law of 1959. It directs that no employer is relieved from compliance with a state law calling for payments into an unemployment insurance fund on the ground that he is engaged in interstate or foreign commerce.

The phrase "interstate commerce must pay its way," originally applied to telegraph companies,[46] began to appear in state business corporation taxation decisions[47] and states began to regard interstate commerce companies as potential sources of income beginning with the Minnesota income tax law of 1933. At first, California and Minnesota seemed to shy away from state and Federal court tests of these laws, or amended laws. Finally, in 1945 the California Supreme Court upheld its separate interstate income tax law, principally on the authority of service of process jurisdiction cases,[48] and the Supreme Court affirmed its opinion in a brief *per curiam* opinion.[49] California and Georgia became more aggressive in their enforcement of these interstate levies, until finally these levies seem to be unfettered except by the Federal interstate income legislation and the rule laid down in the *Spector* case that a state may not levy a franchise tax measured by net income upon an interstate company.

In some states today, it is possible that an unlicensed foreign corporation may be subject to the same taxes as a licensed corporation, with the exception of franchise taxes. Because of the constantly broadening liability of unlicensed corporations to net income taxes, use taxes, property taxes and to withholding and information at the source, there have been corporations which have qualified, even though not technically required to do so. Such voluntary qualification removes questions of the use of the state and Federal courts to enforce local contracts. It also grants a freedom of operations not available to an unlicensed corporation, since it is relieved from constantly reviewing interstate activities and can maintain local stocks of goods, perform local services and carry on other intrastate activities. Each state's requirements must, of course, be examined separately to weigh the course to be followed.

There is a New Jersey decision pending before the Supreme Court of the United States which involves qualification of an interstate company.[50] There, an unlicensed foreign corporation was held doing business and required to comply with the qualification provisions of the Corporation Act and was denied the use of the New Jersey courts to enforce its Fair Trade contracts. The trial court cited the *Northwestern States* case and asked: "If the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?"

If the Supreme Court of the United States should agree, its ruling might have more far-reaching consequences than the *Northwestern States* opinion. Such a result could overturn the rule laid down in the innumerable decisions of the state and Federal courts to the effect that qualification is not required of foreign corporations engaged in interstate commerce only.

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[46] *Postal Telegraph Cable Co. v. Richmond*, 249 U. S. 252, 259 (1919).

[47] *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546 (1938); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357 (1959); *Armco Steel Corp. v. Michigan*, 102 N. W. 2d 552.

[48] *West Publishing Co. v. McColgan*, 166 P. 2d 861 (1946).

[49] *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378, 329 U. S. 822, 67 S. Ct. 35 (1946).

[50] *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 57 N. J. Super. 291, 154 A. 2d 650, aff'd 31 N. J. 591 (1960). Appeal filed in the Supreme Court of the United States, June 20, 1960; Docket No. 203.

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